UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,	:	**Misc No 18- MC-596 (AT)**
Applicant,	:	
- against –	:	
R & S WASTE SERVICES, LLC, WASTE SERVICES INC., and ECSI AMERICA, INC.,	:	
Respondents.	:	

REPLY BRIEF OF RESPONDENTS R & S WASTE SERVICES LLC, WASTE SERVICES, INC. AND ECSI AMERICA, INC. IN FURTHER SUPPORT OF VACATUR OF THE PRE-JUDGMENT WRIT OF ATTACHMENT

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POINT I

THE NLRB HAS NO RIGHT TO RELIEF UNDER THE FDCPA FOR "ROGAN I" BECAUSE IT HAS NO RIGHT TO COLLECT BACKPAY FROM RESPONDENTS

The NLRB's basis for imposing "Rogan I" liability upon Respondents is based upon its assertion that R & S Waste is a *Golden State* successor. As the NLRB started at the January 3 court conference, in order for R&S to be a *Golden State* successor there must be continuity of operations between R&S and Rogan Brothers. Fatal to that argument is that the NLRB has already concluded there is no continuity of operations between R&S and Rogan Brothers since the first week of October 2011 when they completely separated. *Rogan Bros. Sanitation, Inc.*, 2015 NLRB LEXIS 258, *30 (N.L.R.B. April 8, 2015) see also id. *145 ("To the extent that the record can demonstrate a date when there was a complete separation, this would seem to be on or about October 4, 2011..."). The U.S. Court of Appeals for the Second Circuit enforced the NLRB's Decision & Order.

As such, as a matter of law there is no continuity of operation between R&S and Rogan Brothers.[1] The inability to establish continuity of operation therefore prohibits the NLRB from invoking *Golden State* as a salve for its failure to collect backpay from Rogan Brothers for "Rogan I" at any time in the past 8 years. Since the NLRB cannot establish *Golden State* successorship, then it has no right to seek backpay from any of the Respondents for "Rogan I". Therefore, the NLRB cannot have a reasonable cause to believe assets are being dissipated etc. with the affect of hindering the NLRB's ability to enforce "Rogan I". The NLRB cannot use the FDCPA as a tool to recover damages it is not entitled. Consequently, the writ must be vacated as it relates to "Rogan I".

[1] The NLRB wrongly characterizes Judge Carter's finding in 12-cv-6249. Judge Carter based his joint and several liability finding on single employer status not alter ego or successor. 2018 U.S. Dist. LEXIS 52116, *27 (SNDY 2018). Judge Carter also agreed with the NLRB finding that the single employer period lasted from March 2011 to the first week of October 2011. *Id.*, *36.

The lack of a right to recover "Rogan I" backpay from Respondents is underscored by the fact that the "Rogan I" Decision & Order was issued on December 9, 2011 – two months after the NLRB (as endorsed by the Second Circuit) found that Rogan Brothers was completely independent of R&S.

Also fatal to the NLRB's attempt to demonstrate *Golden State* successorship is the historic record compiled at the NLRB hearing and in *Trustees of the Local 813 et al. v. Rogan Brothers,* 12-cv-6249. As set forth in the January 7, 2019 affidavit of Joseph F. Spiezio, III ("Spiezio Affidavit"), R&S did not populate its operation with Rogan Brothers trucks. Spiezio Affidavit, ¶ 11; *see also* 2015 NLRB LEXIS 258, *95 (N.L.R.B. April 8, 2015). Moreover, as the Spiezio affidavit sets forth R&S's fleet was populated with vehicles financed through manufactures without the use of Rogan Brothers funds. Also, the NLRB has already determined none of Rogan Brothers employees continued to work at R&S after the first week of October 2011. Furthermore, Rogan Brothers continued to maintain contracts with Local 456 IBT and Local 282 IBT – two contracts with R&S was neither a signatory or employed workers who were members. *Id.* ¶¶. 41, 375-379. In 2011and 2012 Rogan Brothers also operated in New York City whereas R&S did not because it was not licensed by the Business Integrity Commission. *Id.*, ¶. 101. The NLRB has no response to these facts thereby precluding a *Golden State* finding.

Since the NLRB cannot establish continuity of operation then it cannot demonstrate entitlement to recovery on Rogan I from Respondents. In the clear absence of a right to collect b backpay from Respondents, the NLRB has no right to invoke the FDCPA to protect a right that doesn't exist. Consequently, the writ must be vacated.

POINT II

The NLRB doesn't have reasonable cause to believe that its efforts to collect on "Rogan II" backpay are being hindered.

"The facts presented by the Board in this proceeding demonstrate that Respondents have sought to evade compliance with the Board's Court-enforced Orders." NLRB Supplemental Br., p. 7. The NLRB simply cannot credibly make this assertion because it refuses to acknowledge irrefutable facts that R&S undertook efforts to comply with the "Rogan II" decision as soon as the NLRB contacted R&S at the end of October 2016. R&S has described those efforts and also notified the Court that NLRB's docket for "Rogan II" shows an entry that a certificate of compliance was filed concurrently. The NLRB's continued omission of those key facts vitiates the entire basis upon which the NLRB contends it's entitled to the pre-judgment attachment. In fact, the NLRB had the opportunity to address the efforts that R&S raised at the January 3 conference in their submission on January 7 – the NLRB remained silent? Why? Because it deprives it of the ability to maintain the urgency of the application and the ability to show there has been an effort to hinder or delay NLRB enforcement. The writ must be vacated.

Also, relief under the FDCPA presumes that the NLRB here is entitled to some amount of backpay for "Rogan II". The NLRB can't show that because it never responded to R&S's computation of backpay provided in February 2017 showing nothing is owed. Surely, the NLRB would have refuted the computation during the past two years if it could but didn't. Moreover, the NLRB can't change the historical record that the discriminatees testified driver jobs were available in October 2011 but chose not to take them thereby eliminating the entirety of the backpay period. *Salem Hosp. Corp.*, 2018 NLRB LEXIS 88, *7 (N.L.R.B. 2018) ("If the claimant does not make reasonable efforts to secure interim employment within two weeks, the Board will toll backpay..") Since the NLRB cannot establish any backpay is owed then it cannot demonstrate entitlement to recovery on "Rogan II" from Respondents. In the clear absence of a right to collect backpay from Respondents, the NLRB has no right to invoke the FDCPA to protect a right that doesn't exist. Consequently, the writ must be vacated

Aside from the lack of entitlement to remedial relief sufficient to invoke the FDCPA, the NLRB's speculation about what motivated R&S's "asset transfers" fails factual scrutiny.

The NLRB's entire argument that R&S transferred assets to Waste Services and ECSI to avoid "Rogan I" and "Rogan II" liability is premised on the assumption that Waste Services was created in the aftermath of the NLRB asking R&S its position on whether it could be liable for "Rogan I" at the end of October 2016. As set forth, in the Spiezio Affidavit submitted in this case, R&S merged with Waste Services in 2013 – almost three years prior to the NLRB asking R&S about its position on "Rogan I" liability. The NLRB's putative argument that the merger wasn't embodied in a "public filing" fails because there is no requirement to file the document itself – only a form notice of the merger must be filed with the New York State Department of State when the company intends on making the merger public. *See* January 10, 2010 Spiezio Declaration. As such, the motive for "transfers" cannot be ascribed to "Rogan I" notification. Moreover, since R & S and Waste Services admit that they are one entity for purposes of the NLRB backpay hearing there is no controversy here; the NLRB is strangely arguing against itself by challenging the merger.

Additionally, as set forth in paragraphs 17-24 of the Spiezio Affidavit, there were legitimate business reasons for Waste Services acquiring assets independent of potential backpay liability. Also explained therein is that R&S continued to secure contracts in its name – hardly evasive conduct. The Spiezio Affidavit paragraph 33 addresses the NLRB's erroneous speculation about employee "transfers" - ECSI America, Inc. is merely a payroll master – it doesn't own garbage trucks or perform waste services in its name. Spiezio Affidavit paragraph 49 explains the basis for the sale of "a limited number" of assets to Oak Ridge – to pay for a legal settlement. Paragraph 49 dispels the NLRB's speculation that all of Waste Services assets are being dissipated. The fact is the NLRB has proceeded with the instant action based upon

nothing more than affidavit from a government attorney that does not have first hand knowledge of the facts that should be accorded no weight. *United States v. Perez*, 2001 U.S. Dist. LEXIS 6886, *27 (SDNY 2011).

A final note on the "transfer" of trucks - the first sale occurred nearly six months after the "Rogan I" notification from the NLRB". Under the NLRB's theory the "transfer" of assets would have happened much earlier – but they didn't. Moreover, and critically, R&S was complying with the "Rogan II" Decision & Order during the time the NLRB alleges R&S was hitting the road – the NLRB's entire argument ignores common sense. Additionally, R&S remained open to discussing the backpay computation but inexplicably remained silent. All that the NLRB needed to do was call R&S's counsel to continue the discussion – it didn't. The NLRB should not now be able to concoct (and benefit from) an after the fact story ascribing fantastical reasons for R&S's actions to cover up its failure to act. The NLRB simply has no reasonable cause to believe Respondents are seeking to thwart the NLRB.

A closing point – the NLRB cannot credibly claim it has reasonable cause to believe assets are being dissipated etc sufficient to invoke the FDCPA when it still has never explained why it never sought to compel Rogan Brothers or other entities owned by James Rogan, to remedy the unfair labor practices of "Rogan I" at any time from 2012 through the present. In fact, in 12-cv-6249 the evidence shows that Rogan Brothers affiliated entities included ARJR Trucking Corp., Finne Brothers Carting, Saw Mill Recovery, et al. *See* Dkt # 169, L.R. 56.1, ¶ 372. Rogan Brothers also settled a lawsuit for $155,000 in 2016. 15-cv-7233 (SDNY).

The NLRB has omitted key facts, presented speculation as "fact", failed to explain its eight years of idleness and ignored its own findings. Respondents have armed the Court with reality – that reality requires reversing the true injustice imposed by the writ and ordering its vacatur.

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